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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. .....

CHARLES GARVIN and E. L. ISENBERG,
Petitioners,

v.

WILLIAM HARRY CHILDERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Charles Garvin and E. L. Isenberg, the petitioners herein, pray that a writ of certiorari issue to review the judgment or order of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on June 26, 1967.

OPINION BELOW

The opinion or order of the Circuit Court of Appeals for the Sixth Circuit is unreported and is printed in Appendix A hereto, *infra*, Page 9.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). Order Staying Mandate issued August 9, 1967, granting stay of execution pending the within application.

QUESTION PRESENTED

The question presented is whether or not the Petitioners, as defendants in a tort action tried before a jury in the District Court, were denied due process of law. The District Judge refused to permit them to read the deposition of an absent witness, the deposition having been taken by way of discovery by adverse counsel and the testimony contained therein being important to the defense of the case.

STATUTE INVOLVED (FEDERAL RULE OF CIVIL PROCEDURE)

Federal Rule of Civil Procedure 26(d) (3)-3 is, in part, as follows:

> "The deposition of a witness, whether or not a party, may be used by any party for any purpose if the Court finds . . . or 3, that the witness is unable to attend or testify because of age, infirmity or imprisonment;"

The Fifth Amendment to the Constitution of the United States, or the part involved in this appeal is as follows:

> "No person shall . . . . be deprived of life, liberty or property without due process of law."

STATEMENT

This suit was brought in the United States District Court for the Western District of Kentucky, Bowling Green Division, against the Petitioners, both of whom are citizens of Kentucky, by the Respondent, who is a citizen of North Carolina, and this diversity of citizenship is the basis for Federal jurisdiction in the court of first instance.

The complaint charged assault and battery and an unlawful arrest by a special deputy jailer, Petitioner E. L. Isenberg, acting as an employee of the Petitioner Charles Garvin, who owns the amusement park where the occurrence took place.

The answer admitted the arrest but alleged that it was not unlawful and denied assault and battery.

It was uncontroverted in the trial before the jury that a disturbance involving several people occurred at the go-cart track located in the park.

The Respondent, who was the plaintiff in District Court, admitted his presence at the go-cart track while the ruckus was taking place, but he said, and offered proof, that the Petitioner Isenberg erroneously mistook him for one of those who was engaged in the disturbance.

The Petitioners, who were the defendants in District Court, contended and offered proof that Respondent was in fact one of those taking a very active part in the disturbance.

Several were placed under arrest.

The real question of fact then was one of identity, "was he (the Respondent) or was he not one of the misdemeanants?" If he was, he was lawfully placed under arrest.

A witness, Wallace Gross, an employee of the Defendant-Petitioner Garvin at the amusement park, had indicated his willingness to testify as a witness in behalf of Garvin in that he had voluntarily made one or more trips to Mr. Garvin's lawyer's office in preparing the defense; had voluntarily appeared and given his deposition to the Respondent's counsel by way of discovery without subpoena; had appeared and waited at the Courthouse during the first day of jury trial and had appeared on the second day and waited at the Courthouse for a few hours, all without subpoena.

Before the case was actually completed for the defense, this witness, Wallace Gross, got some creosote in his eyes, and thus became sick and infirm within the meaning of FR 26(d) (3)-3.

Apparently what happened was the witness, before Court convened on the second day of trial, assisted his other employer, Ennis and Hearldson, in loading or unloading some electric utility power line poles.

The poles had been impregnated with creosote as a preservative and some of the creosote got on Mr. Gross's hands and when he rubbed his eyes with his hands, enough creosote got in his eyes to cause him a lot of pain.

Without advising anybody, and without permission, he left the Courthouse and told no one where he was going or where he would be. All efforts to locate him during the rest of the trial were unsuccessful.

It appearing that testimony of Mr. Gross could not be obtained in person, the Petitioners offered, as their last piece of evidence, to read Mr. Gross's deposition that he had given on discovery.

In this deposition Mr. Gross stated positively that the Respondent was one of those causing the disturbance at the go-cart track.

The Respondent objected to the reading of the deposition and the District Court, warning the Respondent that he "may be courting error," sustained the objection and refused to permit the Petitioners to read the deposition to the jury.

The deposition, if it had been read to the jury, would have been of value in establishing the identity of the Plaintiff-Respondent as one of the persons who was involved in the disturbance and therefore properly arrested.

The deposition is persuasive in behalf of the defense and may have been made a difference in the outcome of the jury trial.

REASONS FOR GRANTING THIS WRIT

It is the argument of the Petitioners that this restrictive interpretation of Federal Rule 26(d)(3)-3, so as to prevent the defendants in a damage suit trial before a jury from using a deposition taken by adverse counsel, is in violation of the Petitioner's constitutional right to a fair trial and deprives him of his right not to be deprived of his property without process of law.

It is granted that it would have been better if the Petitioners had placed Mr. Gross under subpoena.

It is understandable, however, that the Petitioners had every reason to believe that he would be present when called to testify and that the issue and service of subpoena would merely add to the costs of the litigation.

And under the circumstances in this case, can it be said that Mr. Gross would have acted any differently if he had been under subpoena?

A man with residual creosote in his eyes does not think too much of the niceties of his technical legal position.

It is granted further that in the orderly administration of justice, it is preferable that witnesses testify in person.

It was certainly preferable from the standpoint of the Petitioners-Defendants that their witness testify in person for he was their witness and his affidavits as to what he could testify to show that his personal testimony would have been stronger in behalf of the Defendants-Petitioners than his deposition, which was given under adverse questioning.

But the question is—should the policy favoring the orderly trial of an action outweigh the right of the jury to know all of the competent and relevant facts and the right of the party defendant to present all of his lawful defenses?

There is a scarcity of authority from the lower courts on this question. There seems to be a tendency of the lower courts, with exceptions, to allow a jury to hear depositions read where the witness is not available to testify.

In *Inland Bonding Company v. Mainland National Bank of Pleasantville*, a 1944 United States District Court of New Jersey case, 3 F.R.D. 438, cited in 8 Federal Rules Service 26c.3, case 1, it was held that a deposition can properly be read to the jury even though the party objecting to the reading of the deposition had lost his opportunity to cross-examine the witness whose deposition was offered. The opportunity to cross-examine was unfortunately lost when the objecting party had agreed to a continuance of the taking of the depositions because of ill health of the witness, and the witness died before he could be cross-examined.

In *Houser v. Snap-on Tools Corp.*, a 1962 case in the Maryland District Court, 202 F. Supp. 181, the Court

permitted the deposition of a witness to be read to the jury when the deponent was in a hospital at the time of the trial.

Modern Federal Practice Digest, "Federal Civil Procedure," Vol. 4, Sec. 26.30, page 1665.

In those instances where the orderly trial will be upset very little if there is a slight departure from the usual method of presenting testimony, as is the case here, it is respectfully submitted that the Courts should allow the slight departure required to allow all the proof to go before the jury.

It is Petitioners' position that the fundamental rights of the litigants to have their case fully presented is essential to a fair trial and that the ruling of the District Court refusing this right to these Petitioners denies them the due process of law guaranteed to them under the Fifth Amendment.

I do not find that this Honorable Court has ever passed on the precise question here presented.

It is respectfully submitted that it should and thus define more clearly the extent of protection the Fifth Amendment affords to litigants.

Does due process include the right to read the deposition of an absent witness under the circumstances of this case? This question is a matter of public interest and concern.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

MARSHALL FUNK,
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Bowling Green, Kentucky,

Attorney for the Petitioners.

Appendix

NO. 17,343

In The
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM HARRY CHILDERS,
Plaintiff-Appellee,

v.

CHARLES GARVIN and
E. L. ISENBERG,
Defendants-Appellants.

ORDER

FILED June 26, 1967

Before: WEICK, Chief Judge, O'SULLIVAN, Circuit Judge, and CECIL, Senior Circuit Judge.

This cause is before the Court on appeal from a judgment, in favor of the plaintiff, in the United States District Court for the Western District of Kentucky, at Bowling Green. The action was in tort in which William Harry Childers, plaintiff-appellee, charged Charles Garvin and E. L. Isenberg, defendants-appellants, with false arrest and assault and battery.

The case was tried before a jury and a verdict was returned in favor of the plaintiff-appellee in the sum of $20,355. Judgment was entered on the verdict and the defendants-appellants appealed. It is claimed that the

trial judge erred in refusing to admit the deposition of a witness who had been in the court room during the progress of the trial but left before he was called as a witness and in refusing to set the verdict aside for the reason that it was excessive.

The appeal was submitted to this Court upon the record in the trial court, the briefs, appendices and oral arguments of counsel.

Upon consideration the Court finds that the claims of the defendants-appellants are without merit.

It is therefore ordered that the judgment of the District Court be and the same is hereby affirmed.

Entered by order of the Court.

/s/ CARL W. REUSS
Clerk